No. 2313

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

THE UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,

Plaintiff in Error,

vs.

T. H. MOORE,

Defendant in Error.

On Writ of Error to the District Court of the United States for the District of Oregon.

VOL. II.

TRANSCRIPT OF RECORD.

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THE UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,

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Defendant in Error.

Names and Addresses of Attorneys upon this Writ:

For the Plaintiff in Error:

F. S. Senn, Yeon Bldg., Portland, Ore.

For the Defendant in Error:

Giltner & Sewall, Yeon Bldg., Portland, Ore.

INDEX

And afterwards, to wit, on the 22 day of July, 1913, there was duly filed in said Court, a Stipulation, in words and figures as follows, to wit:

[Stipulation to Amend Bill of Exceptions.]

In the District Court of the United States for the District of Oregon.

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,

Defendant.

It is hereby stipulated and agreed by and between Giltner & Sewall, attorneys for the plaintiff and F. S. Senn, attorney for the defendant, that whereas the Bill of Exceptions as settled, allowed and filed in the above entitled action is incorrect and fails to contain as it should and as it was intended to contain, all of the testimony introduced by both parties at the trial of said cause; and whereas, at the trial of said cause the plaintiff introduced in evidence the testimony of one J. H. Piltz and his deposition, which said testimony and deposition was read to the jury in said cause; and whereas, the plaintiff also introduced the deposition and testimony of one Carl Carlgren at the trial of said cause, which was likewise read to the jury in said cause; and whereas the said Bill of Exceptions as settled and allowed does not include the testimony or depositions of either of said witnesses;

NOW, THEREFORE, it is hereby stipulated and agreed that the said Bill of Exceptions may be amended to include the said testimony and depositions of said witnesses by inserting the same and attaching the same to and making the said testimony and depositions a part of the said Bill of Exceptions. Dated July 22nd, 1913.

GILTNER & SEWALL,
Attorneys for Plaintiff.
F. S. SENN,
Attorney for Defendant.

[Endorsed]: Stipulation. Filed July 22, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of July, 1913, there was duly filed in said Court, an Order, in words and figures as follows, to wit:

[Order Amending Bill of Exceptions.]

In the District Court of the United States for the District of Oregon.

T. H. MOORE,
Plaintiff,
vs.
UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,
Defendant.

Now, at this time comes Giltner & Sewall, attorneys for plaintiff in the above entitled action, and based on the stipulation of counsel on file herein, moves the Court that the Bill of Exceptions hereto-

fore settled, allowed and filed in the above entitled cause be amended, so as to include therein the testimony and depositions of two witnesses on the part of the plaintiff, towit: J. H. Piltz and Carl Carlgren; which said testimony and depositions were introduced in the evidence at the trial of said cause and were read to the jury; and it appearing to the Court that the said depositions and testimony should properly appear in the Bill of Exceptions, and that through inadvertence and oversight the same were overlooked and were not included in and do not appear as part of the record and proceedings in said Bill of Exceptions;

Now, Therefore, it is hereby ORDERED that the said Bill of Exceptions heretofore settled, allowed and filed in this cause be amended by inserting and attaching thereto the testimony and depositions of the said witnesses, J. H. Piltz and Carl Carlgren introduced at the trial of said cause, so that the said Bill of Exceptions shall contain a true and correct record of the proceedings had in said cause.

Dated July 22nd, 1913.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Order. Filed July 22, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of July, 1913, there was duly filed in said Court, a Stipulation, in words and figures as follows, to wit:

[Stipulation to Amend Transcript.]

In the District Court of the United States for the District of Oregon.

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,

Defendant.

It is hereby stipulated and agreed by and between Giltner & Sewall, attorneys for the plaintiff, and F. S. Senn, attorney for the defendant in the above entitled cause, as follows: That, Whereas, the Bill of Exceptions heretofore settled, allowed and filed in said cause has been, by order of Court, amended this day, so as to include the testimony and depositions of two witnesses on the part of the plaintiff, towit: J. H. Piltz and Carl Carlgren; the same having been through inadvertence and oversight omitted from the said Bill of Exceptions; and Whereas, the Transcript of Record, this day served on the Plaintiff, contains a copy of the Bill of Exceptions as it was formerly settled, and without the amendments thereto;

Now, Therefore, it is agreed that the said Transcript of Record may be amended by attaching thereto and including therein a copy of the Amended Bill of Exceptions.

Dated July 22nd, 1913.

GILTNER & SEWALL,
Attorneys for Plaintiff.

F. S. SENN,
Attorney for Defendant.

[Endorsed]: Stipulation. Filed July 22, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of July, 1913, there was duly filed in said Court, an Order, in words and figures as follows, to wit:

[Order Amending Record.]

In the District Court of the United States for the District of Oregon.

T. H. MOORE,
Plaintiff,
vs.
UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,
Defendant.

Now, at this time comes F. S. Senn, attorney for the defendant above named, and based on the stipulation of counsel on file herein, moves the Court that the said defendant be allowed to amend the Transcript of Record in the above cause by attaching thereto and inserting therein a copy of the Amended Bill of Exceptions; and it appearing to the Court that the Court has this day allowed an amendment to be made to the Bill of Exceptions heretofore settled, allowed and filed, and that the printed Transcript of Record contains a copy of the Bill of Exceptions as it was formerly settled, and without the amendments thereto;

Now, Therefore, it is ORDERED, that the said Transcript of Record in the above cause may be amended by attaching thereto and including therein a copy of the Amended Bill of Exceptions.

Dated July 22nd, 1913.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Order. Filed July 22, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 9 day of April, 1913, there was duly filed in said Court, a Deposition, in words and figures as follows, to wit:

[Deposition.]

In the District Court of the United States for the District of Oregon.

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,

Defendant.

It is hereby stipulated and agreed by and between the parties hereto, acting through their respective attorneys, that the deposition of Carl Carlgren, a witness on behalf of the plaintiff, may be taken in the City of New York, in the State of New York, before L. L. Pierce, at the New York County Bank, corner of 8th Avenue and 14th Street, upon the direct, cross

and redirect interrogatories hereto attached and made part hereof, and such other questions as may be asked by attorneys for either side who may be present.

It is further agreed and stipulated that said witness shall first be duly sworn to tell the truth, the whole truth and nothing but the truth; and thereafter said interrogatories shall be propounded by said L. L. Pierce to said witness and said witness shall make answer thereto; that said interrogatories, together with the answers of said witness thereto, shall be reduced to writing in the presence of the witness and said L. L. Pierce, and shall thereafter be signed and subscribed by said witness; that thereafter the said L. L. Pierce shall attach his certificate to said deposition, showing that the same was taken before him according to the terms of this stipulation, and shall issue the same under his seal and shall cause the said deposition to be sealed up in an envelope and addressed to the Clerk of the above entitled Court at Portland, Oregon; and that thereafter the said deposition may be used upon the trial by either party hereto, subject to any and all legal objections which may be interposed by either party hereto upon the trial of said action, except that no objection shall be made on the ground that the question is leading or as to the form, time, place and manner of taking said deposition, which are hereby waived.

Dated at Portland, Oregon, March 8, 1913.

(Sd) GILTNER & SEWALL,
Attorneys for Plaintiff.

(Sd) WILBUR & SPENCER,
Attorneys for Defendant.

[Deposition.]

In the District Court of the United States for the District of Oregon.

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,

Defendant.

Deposition of Carl Carlgren, a witness on behalf of the plaintiff, taken before L. L. Pierce, Commissioner, at No. 128 Broadway, in the Borough of Manhattan, in the City, County and State of New York, on the 28th day of March, 1913.

The said Carl Carlgren, having been first duly sworn, did depose and say:—

1st Interrogatory. Please state your name, age, residence and occupation.

Answer. Carl Carlgren; 32; Market Hotel, 405 West 13th Street, Manhattan, New York City; Carpenter.

2nd Interrogatory. Do you know T. H. Moore, the plaintiff in this action?

Answer. Yes.

3rd Interrogatory. Were you ever in the employ of this defendant while it was constructing a bridge known as the Broadway Bridge, across the Willamette River in Portland, Oregon?

Answer. Yes.

4th Interrogatory. Were you working for the de-

fendant on and before October 2nd, 1911, on the said bridge?

Answer. Yes.

5th Interrogatory. Do you know of the plaintiff, T. H. Moore, being hurt on a staging leading from the cofferdam to the bank of the river on the east end of said bridge on or about October 2nd, 1911?

Answer. Yes.

6th Interrogatory. If you answer the last question by "Yes," state, if you know of your own knowledge, how it happened.

Answer. I did not see the accident. I was working on the job about the time but I am not sure that I was working there that day.

7th Interrogatory. State, if you know, whether there was a temporary staging built from the cofferdam to the bank of the river on or about October 2, 1911?

Answer. Yes, there was.

8th Interrogatory. Describe the staging and how and of what it was made.

Answer. It was made of cement from lumber about 1½ inches thick by about 3 feet and six inches wide. This staging ran from the top of the cofferdam on to the river bank and it was about 10 or 12 feet long. I do not remember whether there were any supports under this or not. It had no railing on the side. The boards had been used for cement forms and the boards had nails sticking up in them. This is all I know about the staging.

9th Interrogatory. What was the color of the

boards that composed it?

Answer. They were discolored with cement.

10th Interrogatory. What had these boards been used for, if you know, before being used in the staging?

Answer. Cement forms.

11th interrogatory. What was the staging used for?

Answer. Used by the men taking forms off of the cofferdam and piling the planks up on the bank.

12th Interrogatory. Was there any other way of carrying lumber or timbers from the cofferdam to the bank of the river and from the bank of the river to this cofferdam, than by this temporary staging?

Answer. No.

13th Interrogatory. What were Mr. Moore and the other men sent to do on the cofferdam on the morning of the accident, if you know?

Answer. I do not know.

Cross Interrogatories.

Q. To which pier do you refer to in your direct examination?

A. East side pier.

Q. On what side of the cofferdam was the staging, if any?

A. On the east side.

Q. Was it on the north side of the cofferdam?

A. No, on the east side.

Q. Was not this staging used for the men to walk from the bank out to the scow and to the ladder and

was it not used for the men in going and coming from their work to get out into the river?

A. No, there was a stairway built for the men to go out from the railroad down to the river and the float at the foot of the stairway.

Q. State any other fact which might throw any light on this accident.

A. That is all I know about it.

Q. How far was the float from the cofferdam?

A. 6 or 8 feet.

Q. And the float you say was 6 or 8 feet from the bank of the river?

A. No, the float was against the river bank.

Q. How far was the cofferdam from the ladder?

A. About 30 feet from the ladder.

Q. Do you know whether there were any nails sticking up in this particular staging?

A. I do not. I do not remember.

CARL CARLGREN,

Sworn to before me this ..... day of March, 1913.

(Seal) LEWIS L. PIERCE,
Commissioner and Notary Public
for Kings Co., New York.

[Endorsed]: Deposition of Carl Carlgren. Filed Apr. 9, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 2 day of April, 1913, there was duly filed in said Court, a Deposition, in words and figures as follows, to wit:

[Deposition.]

In the District Court of the United States for the District of Oregon.

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,

Defendant.

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the deposition of J. H. Piltz, a witness on behalf of the plaintiff, may be taken at the offices of Giltner & Sewall, 1125 Yeon Building, in the City of Portland, Oregon, before H. A. Van Horne, Notary Public, on the 8th day of March, 1913, between the hours of 10 o'clock A. M. and 6 P. M. or thereafter. To begin at 10 A. M.

It is further agreed and stipulated that said witness shall first be duly sworn to tell the truth, the whole truth and nothing but the truth; that said deposition shall be reduced to writing and the signing of the same by said witness shall be waived; that said deposition shall be sealed up in an envelope and addressed to the Clerk of the above entitled Court at Portland, Oregon; and that thereafter said deposition may be used on the trial of said action by either party hereto, subject to any and all legal objections which may be interposed by either party hereto upon the trial of said action, except that no objection shall

be made on the ground that or as to the form, time, place and manner of taking said deposition, which said last are hereby waived.

Dated at Portland, Oregon, March 4, 1913.

GILTNER & SEWALL,
Attorneys for Plaintiff.
WILBUR and SPENCER,
Attorneys for Defendant.

In the District Court of the United States for the District of Oregon.

[Deposition of John Piltz.]

T. H. MOORE,

Plaintiff,

vs.

UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,

Defendant.

BE IT REMEMBERED, that pursuant to the annexed stipulation, the said witness, John H. Piltz, appeared before me on March 8, 1913, at 10:00 o'clock a. m., at the offices of Giltner & Sewall, 1125 Yeon Building, in the City of Portland, Oregon, the plaintiff appearing by Mr. Giltner of counsel for plaintiff, and the defendant appearing by Mr. Senn of counsel for defendant.

Said witness, John H. Piltz, being first duly sworn by me to tell the truth, the whole truth and nothing but the truth, deposed and said as follows:

Direct Examination.

By Mr. GILTNER:

State your name, age, residence and occupation.

A. John H. Piltz; age forty; residence Berkeley, California; occupation master mariner.

Q. Are you acquainted with T. H. Moore, the plaintiff in this case?

A. I am.

Q. Are you acquainted with the Union Bridge and Construction Company a corporation?

A. I am.

Q. State whether or not you were in the employ of this defendant company at that time?

A. I was in the employ of the Union Bridge Company off and on from about June, 1909, to about the middle of October, 1911.

Q. State if you were in their employ on or about the second of October, 1911.

A. I was.

Q. What position did you occupy there with these people?

A. Gang foreman.

Q. Who was superintendent over you?

A. James Dawson.

Q. Did you do any work upon what is known as the Broadway bridge across the Willamette river, in Portland, Oregon?

A. I did.

Q. State whether or not you did any work on the East end of that bridge, on the coffer dam.

A. Yes, sir.

Q. Prior to the second day of October, 1911?

A. I worked on that East pier off and on for possibly four months.

Q. I wish you would state what you did there, if anything, in regard to removing the cement forms from the piers and piling them on the bank of the river, and how it was done.

A. When other work wasn't too pressing, we used to go over to the East pier, the gang,—sometimes two or three, sometimes five or six, removing these forms off of there and take them over to the bank, and pile them up; and to make it convenient we built staging, or a platform across there out of the old boards torn down, to walk across.

Q. State whereabouts this staging was built, and state how it was built.

A. The staging was built approximately, you might say, half way between the two piers, as near as you can get it, and one end on a piece of board on the coffer dam resting on the rocks, and the other end lying on an old log, the boards laid crossways. There was a space there of some five or six feet of water.

Q. What was the color of the boards that composed this staging or runaway from the coffer dam to the river bank.

A. Ordinary boards torn off the cement; usually that class of lumber has got a whitish appearance.

Q. Who put those up?

A. I had it put up.

Q. Were you present when it was done?

A. I was around on the job, yes, sir.

Q. State under whose orders these cement forms were taken off and the staging put up.

A. My orders from Mr. Dawson were to go and remove what I got from the forms and pile it up on the beach in the quickest, convenientest way I could figure out.

Q. Were those boards piled on the beach, or scattered all over the beach.

A. They were supposed to be piled up.

Q. Were they piled up?

A. The majority were, but there was a few stray ones scattered around, because the boards were being used for different purposes, as they were demanded.

Q. What was this staging used for?

A. Just to take the boards off of the forms over to the beach.

Q. Do you remember when this was put up,—about what time, as to the second of October, 1911?

A. I couldn't say exactly; somewhereas probably a week or so previous, possibly more than a week; I don't exactly remember the date. There has been half a dozen different stagings built there at that same pier, to my knowledge, at different times.

Cross Examination.

By Mr. SENN:

What are you doing now?

A. Master Mariner, going to sea for a living.

Q. How long since you worked for the Union Bridge Company?

A. Somewheres about the middle of October, 1911.

That's all.

Witness excused.

[Endorsed]: Deposition of John H. Piltz. Filed Apr. 2, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Wednesday, the 23 day of July, 1913, the same being the ..... judicial day of the regular July, 1913, term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Extending Time to File Record.]

"In the District Court of the United States for the District of Oregon.

No. 5568

July 23, 1913.

T. H. MOORE,

v.

UNION BRIDGE & CONSTRUCTION CO.,

Now, at this time, good cause appearing it is Ordered that defendant's time for filing the record and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same

hereby is enlarged and extended to and including August 15, 1913.

CHAS. E. WOLVERTON,
Judge.

And afterwards, to wit, on Wednesday, the 13 day of August, 1913, the same being the thirty-third judicial day of the regular July, 1913, term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

"In the District Court of the United States for the District of Oregon.

No. 5568

August 13, 1913.

T. H. MOORE,
Plaintiff,

v.

UNION BRIDGE & CONSTRUCTION COMPANY, a corporation,
Defendant.

Now, at this time, good cause appearing, it is Ordered that the time for filing and docketing defendant's transcript of Record in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same hereby is enlarged and extended to and including the 1st day of September, 1913.

CHAS. E. WOLVERTON,
Judge.

No. 4

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

THE UNION BRIDGE & CONSTRUCTION COMPANY,
a Corporation,
Plaintiff in Error,

vs.

T. H. MOORE,
Defendant in Error.

Plaintiff in Error's Brief

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

THE UNION BRIDGE & CONSTRUCTION COMPANY,
a Corporation,

Plaintiff in Error,

vs.

T. H. MOORE,

Defendant in Error.

NAMES AND ADDRESSES OF ATTORNEYS
UPON THIS BRIEF:

FOR PLAINTIFF IN ERROR:

F. S. SENN, Yeon Bldg., Portland, Ore.

FOR DEFENDANT IN ERROR:

GILTNER & SEWALL, Yeon Bldg., Portland, Ore.

INDEX.

STATEMENT OF THE FACTS.

At the time of the accident the plaintiff-in-error was constructing a sub-structure of a bridge across the Willamette River at Portland, Oregon. This work consisted of sinking several concrete piers into the bed of the river. One of these piers was located near the east edge of the river. This particular pier was some thirty-five feet deep under the surface of the ground and projected twenty feet into the air. Around this pier there was built what is known as a coffer dam. This coffer dam is an outer casing made of lumber which is constructed around the cement pier. The coffer dam is water-tight and its purpose is to keep the water away from the cement pier while the men are sinking the pier. The coffer dam was sixty-eight feet long and twenty feet wide. The cement pier was sunk inside of this coffer dam and was something like sixty feet by fifteen feet. This coffer dam was constructed of timbers laid on top of each other, which timbers were bolted and nailed together. The timbers were about 12x12 inches square. From the ground up to the top of the cement pier a lumber casing or form had been constructed. This casing or form was made of some 2-inch planks, thoroughly bolted, into which the cement was poured and in this way the cement pier was projected into the air until the necessary height was reached.

At the time of the accident to the defendant-in-error herein, the concrete work on this pier had been finished and the defendant-in-error and several of the other employees of this plaintiff-in-error were engaged in tearing down this form or outer casing of the pier and in pulling out the timbers

which were built around the cement pier and which comprised part of the coffer dam. The employees at the time of the accident had torn off all the planking to the level of the water or ground. For this purpose they were using crowbars, picks and also a donkey engine. Whenever a plank was so solid that they could not break it loose with a crowbar or pick, they fastened the end of a chain to it and by means of the donkey engine pulled the plank or sill from its fastenings. After the planks were torn loose,the employees would sometimes carry them to the bank. Other times, if they would drop into the water, they would be towed around the coffer dam. At the time of this accident, which occurred on October 2nd, 1911, this defendant-in-error was engaged in helping dismantle this coffer dam and at the time of the accident testified that he was carrying planks from the bank onto the coffer dam. He stated that this distance from the coffer dam to the bank was some six or seven feet and that there was some water there and that some planks had been thrown lengthwise of the coffer dam for him to walk upon. He stated that these planks were lying there when he started to work and that while walking across these planks he stepped on a nail which punctured his shoe and went into the ball of his foot, from which blood-poison resulted and later on the ball of his foot was amputated thru the instep. The plaintiff explained of what these planks consisted of, referring to page 39 of the Transcript of Record.

Q. You spoke of a log coming out here (meaning the coffer dam). Did it come clear from the bank to the coffer dam?

A. No, sir, it did not reach to the coffer dam by a foot and a half or such matter.

Q. These planks were thrown on this log?

A. Yes, the north end of these planks lay on that timber.

Q. And this staging was about how far from the coffer dam?

A. I presume about a foot and a half.

Q. And how far was it from the bank of the river on the other side?

A. Well, the water was very shallow there from the bank—it was probably two feet.

Q. Then you would step from the coffer dam onto these loose planks that were thrown across the log?

A. Yes, sir.

Q. And walk across four or five, you say?

A. Yes, sir.

Q. And then you would step a distance of two feet on the bank?

A. It would probably be two feet, I don't know exactly.

Q. There would be water between the staging and the bank, a little?

A. The planks were not erected close together or anything. They were probably two or three inches apart—something like that. They wasn't placed up close together.

Q. Were they in perfect line or scattered around?

A. Oh, yes, they were in perfect line.

Q. But they were not spiked down or nailed down, or anything like that?

A. No, sir; they wasn't spiked down.

Q. Do you know how they got there?

A. No, sir.

On page 43 of this Transcript of Record we have the following questions:

Q. Now, you say these planks here, there were four or five of them, how wide were they?

A. Well, they were 2x6 or 2x8. I wouldn't say positively which.

Q. That is, they were 6 or 8 inches wide?

A. Inches wide—yes, sir.

Q. And they were just laid side by side?

A. Yes, sir.

Q. Loose on these poles?

A. Yes, sir.

This was the only testimony as to the nature of this so-called staging upon which the plaintiff claims he was injured. All the witnesses for the defendant—and there were four in number—stated that there was no staging there of any description.

Chalfan and Hofstetter, the two employees who worked with the injured party at the time of the accident, both testifed that the injured stepped on a nail on the bank, and the engineer for the City of Portland stated that he came along there at about the time of the accident and saw the injured sitting on the bank with his shoe off. This the injured also denied. All the witnesses, including the injured, testified that the plaintiff-in-error did have a regular plankway, bolted down with a railing on it on the north side of this coffer dam. This was the staging provided by the bridge company for use by its employees and all the witnesses, except the injured man, stated that this was the one which was used to carry planks on and for ingress to and egress from this coffer dam.

From this testimony of the plaintiff—and he was the only witness that testified about the staging upon which he was injured—it appears that there were four or five planks from 12 to 14 feet long, 6 to 8 inches wide and 2 inches thick laid flat

on the ground at one end and the other end was laying on an old decayed log which projected out from the bank toward the coffer dam. He stated that the planks were not close together, some of them were two or three inches apart. That they were of different lengths; that they were not even, nor were they nailed or stationary.

There was a deposition introduced in evidence from a witness Piltz, who stated that he had built four or five stagings around this coffer dam prior to the time of the accident. He said that four or five men under him and himself went over to this coffer dam and built stagings around it at various times prior to the time of the accident and the witness Carlgren, whose deposition was also introduced, testified that there were stagings around this coffer dam. The Bridge Company does not contend that there were no stagings around this coffer dam. The testimony showed—and no doubt, the fact was—that while this coffer dam was in the course of construction, many stagings were built. Plantiff-in-error claims that this staging testified to by Moore, the injured, could not possibly have been the staging erected by Piltz, as Moore testified that it was simply four or five planks that were taken from this coffer dam and thrown on the ground. After the introduction of all the testimony, the plaintiff-in-error moved for a directed verdict on the following grounds:

(1) That there was not sufficient evidence of negligence to be submitted to the jury.

(2) That this platform or walkway upon which the injured testified he was injured was not of a permanent nature, as it was merely three or four planks thrown side by side by the employees them-

selves, and even though there was a nail in one of these planks, the plaintiff-in-error was not responsible for such a condition.

(3) That at the time of the accident the injured with his fellow-employees were engaged in carrying out a detail of work. They were tearing down the casing or coffer dam and that while engaged in that work they were fellow-servants, and if some of the employees threw these planks down for the men to walk upon, it would be an act for which the Bridge Company is not responsible and that the rule of a reasonably safe place to work would not apply to this case, as the employees were making their own place to work.

This motion, after extended argument, was overruled, and a verdict was returned by the jury for the sum of $9000.00 in favor of the injured party. A motion for a new trial was then made on the two grounds:

(1) That the verdict was excessive.

(2) That the Court erred in refusing to direct a verdict. This motion was also denied.

The testimony further showed that the injured was a single man, forty-six years of age and was earning approximately $80.00 per month. That he had worked in and about this bridge for several months prior to the accident and that he was a man of considerable experience in and about bridge work.

POINTS AND AUTHORITIES.

"The injured party and his fellow-employees at the time of the accident were engaged in carrying out a detail of work. The pier had been completed and they were tearing down the forms, taking out the pipes and in doing this work, the lumber was

scattered around the coffer dam, all of which, no doubt, had nails in it, and the Bridge Company owed the injured party no duty in regard to a reasonably safe place for the reason that the injured and his fellow-employees were making their own place."

Subbo vs. Pacific Coast Construction Co., 133 Pac. 83.

Kreigh vs. Westinghouse, Church, Kerr & Co., 152 Fed. 120.

The plank upon which the injured testified he was injured was a temporary structure erected by the employees and for which the Bridge Company was not responsible.

Middleton vs. P. Sanford Ross, 202 Fed. 799.

Armour vs. Hahn, 111 U. S. 313.

Haughey vs. Thatcher, 85 N. Y. S. 935.

Phoenix Bridge Co. vs. Castleberry, 131 Fed. 175.

Reynolds vs. Barnard, 168 Mass. 226.

Anderson Admr. vs. Smith, 226 U. S. 439.

The injured party and the men working about him were fellow-employees, and if some of his fellow-employees threw down these planks while doing this work and the injured passed over them, it would be the act of a fellow-servant.

Most vs. Kern, 34 Ore. 237.

Brunell vs. S. P. Co., 34 Ore. 256.

Seeds vs. American Bridge Co., 144 Fed. 605.

Baugh vs. Baltimore & Ohio Railroad Co., 149 U. S. 368.

The company in this case had provided a safe runway and staging for the men to walk upon and use in doing their work and if the men, including this injured man, prepared a place of their own, or provided a temporary walkway, the Bridge Com-

pany is not liable for negligence because of a defect in the temporary structure. In such a case the injured employee is guilty of contributory negligence and assumes the risk.

Dryden vs. Pelton-Armstrong Co., 53 Ore., page 418.

ARGUMENT.

In the statement of facts we have dwelt somewhat on the evidence and have set forth the testimony of the injured party so far as was related to the platform where he claims he was injured. The injured party is the only witness who testified as to what this staging consisted of. All the other witnesses, among whom were Chalfan, Hofstetter, Clark and Holmes, testified that there was no such platform there. The superintendent, Dawson, also testified that they had a regular scaffolding gang and this gang had never constructed such a platform as the injured man complains of.

The defendant-in-error contends and claims that the deposition of Piltz and Carlgren was to the effect that the Bridge Company constructed this platform or staging. The physical facts, however, did not bear out any such conclusion. It is hardly conceivable that this foreman, Piltz, would take a gang of men and go over to this pier and build such a platform as described by the injured. The fact remains beyond question; if there was a platform there, as the injured contends, it was one prepared by the men themselves by simply throwing a few of the loose planks on the ground. The injured testified that there were several hundred planks laying around this coffer dam. A large number were piled up on the bank. All the witnesses testified that these planks that were scattered about the

coffer dam and the bank were taken from this pier. That is, were stripped off and, no doubt, many of them had nails in them. It would not be more than a minute's work for a man to throw four or five of these planks on the ground. From the coffer dam to the bank was only a few feet.

Some of the witnesses testified that there was water probably a foot deep at some points. Other witnesses testified that some of the excavated dirt had been thrown between the coffer dam and the bank and that while the dirt was soft, it was possible to walk on the dirt.

Whatever the facts remain to be, assuming that plaintiff's testimony is true, the most you can claim for this testimony is that the employees threw down a few of these planks which they had stripped from this pier and plaintiff walking over and across these planks received a puncture in the ball of his foot. If this had been a staging built by the Bridge Company or of a permanent character, or if it had been the only walkway that was there at the time, we would not argue this point, but all the testimony shows and points out that this company did have a float from the bank to the coffer dam which was constructed of solid planks, bolted to a log raft. The injured did not deny this and all the witnesses testified that this float could have been used and was used for the men to cross upon.

Referring briefly to the testimony of Hofstetter, pages 174 and 175 of the Transcript of Record, in which Hofstetter detailed the conversation had with the injured after the accident:

Q. Did Mr. Carlgren have any talk with him (meaning the injured)?

A. Yes, sir.

Q. What was the conversation?

A. He asked him what was the matter and he said he stepped on a nail.

Q. Was there any further conversation?

A. Not that I heard.

Q. Did he state anything about where the nail was?

A. He said it was in the board.

Q. Did he point to the board, or did he not?

A. No, not when I was there. He pointed off that way. Now, I don't know whether he meant to the board or what it was.

Q. Where were these boards that he pointed to?

A. They were all around on the shore there.

Q. On the bank where he was sitting?

A. There were boards scattered all over there.

Q. Hoy many boards were there?

A. Oh, I don't know. There must have been two or three thousand boards—a pile of them.

Q. They came clear from the top of the pier?

A. Yes, sir.

Q. How many boards were there?

A. Well, some of them would be probably—I think two-foot was the shortest piece they could use.

Q. Two feet long, some of them?

A. Yes, sir. That would be the shortest piece. Very seldom they used a piece two feet long; at times they did. And there were some fourteen or fifteen feet, I suppose. I don't know just how long.

Q. That was about the longest?

A. Yes, sir.

The other witnesses' testimony in regard to the boards that were lying about the place where the injured was hurt was practically the same. They

had been stripping these forms from the pier for several days. The injured was a man of some experience, as he testified that he had worked for the Bridge Company for several months before the accident; that he had followed building work and construction work for years, and, no doubt, knew that this lumber had nails in it. A glance would show him the condition of this lumber. The plaintiff-in-error's condition in this appeal is briefly that this plaintiff, being an experienced man with considerable knowledge of this kind of work, was injured by stepping on one of the loose boards that were thrown about this coffer dam. The fact that three or four of these boards were laid side by side for the injured or other employees to walk upon does not make the Bridge Company guilty of negligence. They were engaged at the time of the accident in demolishing this outer casing or form. They were cleaning up the debris which they themselves created. The foreman Chalfan was at the place of the accident, but even in doing this work of cleaning up, any act of the foreman would be the act of a fellow-servant. It was not a case where an employer had provided a platform or a staging or an appliance for the men.

As stated by the witness Hofstetter, on page 176 of the Transcript of Record: "There might have been a plank throwed in there, because there is quite often a plank throwed in there to walk on."

Q. Was there any built staging in there?

A. There was no built staging.

The testimony of Chalfan, Clark and Holmes and the City Engineer was to the same effect. No doubt, the men in getting around the coffer dam would occasionally pick up a plank and throw it on

the ground, but for this act the Bridge Company is not responsible.

In the case of Seeds vs. American Bridge Co., 144 Federal 605, Judge Sanborn lays down the duties of an employer and the duties of an employee as follows:

"The risk that a safe place will become unsafe or that safe machinery will become dangerous by the negligence of the servants who use them, is one of the ordinary risks of the employment which the servants necessarily assume when they accept it. It is a risk of operation and not of construction or provision, and the duty to protect place and machinery from dangers arising from negligence in their use is a duty of the servants who use them, and not that of the master who furnishes them."

In this case the defendant-in-error was not so providing a place of permanent structure. There is no testimony in this case from which it can be assumed that the Bridge Company had anything to do with preparing this little platform over which the injured states he walked when injured. This injured party and his fellow-workmen were engaged in carrying out a detail of the work of demolishing this outer casing, tearing it up and removing the planks as they were stripped from the pier. In such work the rule of a safe place does not apply and cannot apply for the reason that the place is continually changing and the workmen themselves are making the place. In doing such work even under the instruction of a foreman, the workmen assume the risk of injury. In such a case there is no duty to provide safe machinery or appliances on the part of the employer.

As was said by Mr. Justice Brewer in the case

of Baltimore & Ohio Railroad Co. vs. Baugh, 149 U. S. 134:

"Prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow-servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow-servants. All enter into the service of the same master to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employees, and that risk, which he knows exists, he assumes in entering into the employment. * * * He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid."

But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply co-workers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employee, it includes all coworkers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as

though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible.

In Section 1545, 4 Labatt's Master and Servant, 2nd Edition, the following rule is annunciated:

"The general rule to which, for reasons to be explained in the following section, the courts have now committed themselves, may be stated thus: If the master supplies suitable material for the construction of an appliance which he is not obliged, and has not undertaken, to furnish in a completed state, and the workmen themselves construct it according to their own judgment, the master is not liable for the manner in which they used the materials thus supplied."

In this chapter and section this author discusses in detail the non-liability of the employer for acts of the servants in arranging temporary scaffolds, lays down the general rule that in temporary scaffolds there is no obligation or positive duty on the part of the employer to look for defects. So, in the case under consideration, the lumber from which this walkway was made was old lumber which had been scattered around this coffer dam. It had been stripped from the pier and the men themselves had laid it down to walk upon. For such an act the master is not responsible and should not be held liable.

In the case of Callan vs. Bull, 113 Cal. 593, the following rule is annunciated:

"The rule which required the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when

the machinery of other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done or the appliances for doing the same are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but, if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation. The rule does not apply to a case where several persons are employed to do certain work, and, by the contract of employment, either expressed or implied, the employees are to adjust the appliances by which the work is to be done."

We submit that under the evidence in this case, the Court was in error in not directing the jury to find a verdict for the defendant, and respectfully submit that the case should be reversed.

Respectfully submitted,

F. S. SENN.